84-1066

Office - Supreme Court, U.S.
FILED
DEC 28 1984
ALEXANDER L. STEVAS,
CLERK

NO:_____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term

UNITED STATES OF AMERICA

Appellee

vs.

ROBERT H. WALLACE

Appellant

On Petition for Writ of Certiorari from the
Sixth Circuit Court of Appeals No: 84: 5204

PETITION FOR WRIT OF CERTIORARI

DALE QUILLEN
Attorney for appellant
Suite 208, Cavalier Building
95 White Bridge Road
Nashville, Tennessee 37205
(615) 356-1580

19

QUESTION PRESENTED FOR REVIEW

WHETHER A SEARCH WARRANT DIRECTING SEARCH OF AN ENTIRE BUILDING CONTAINING A RESIDENCE AND TWO SEPARATE BUSINESSES WITHOUT DESCRIBING WHICH UNITS ARE TO BE SEARCHED AND WITHOUT STATING PROBABLE CAUSE TO SEARCH EACH UNIT VIOLATES THE FOURTH AMENDMENT, REQUIRING EXCLUSION OF EVIDENCE OBTAINED PURSUANT TO THE SEARCH OF THE ENTIRE BUILDING, INCLUDING A UNIT NOT DESCRIBED AND FOR WHICH NO PROBABLE CAUSE WAS STATED.

A LIST OF PARTIES TO PROCEEDINGS

ROBERT H. WALLACE, Appellant.

DALE M. QUILLEN, Counsel for appellant, Suite 208, Cavalier Building, 95 White Bridge Road, Nashville, Tennessee 37205.

UNITED STATES OF AMERICA, Appellee, represented by Joe Brown, United States Attorney, Middle District of Tennessee, 879 U.S. Courthouse, 800 Broadway, Nashville, Tennessee 37203.

SOLICITOR GENERAL FOR THE UNITED STATES, Department of Justice, Washington, D.C.

TABLE OF CONTENTS

Table of Authorities 4

Reference to Unofficial Report of Opinion Below 5

Statement of Jurisdiction 5

Constitutional and Statutory Provisions 5, 6

Statement of the Case 6-9

Argument 9-13

Certificate of Service 13

Appendix ..... A-1 - A-5

TABLE OF AUTHORITIES

Commonwealth v. Erickson, 14 Ma. App. 504, 440, N.E.2d 1190 (1982) 12

National City Trading Corp. v. U.S., 635 F.2d 1020, (2nd Cir. 1980) 12

Steele vs. United States, 267 U.S. 498, 69 L.Ed. 757, 45 Sup. Ct. 414 (1925) 9

United States v. Bedford, 519 F.2d 650 (3rd Cir. 1975) cert. denied, 424 U.S. 917, 96 Sup. Ct. 1120, 47 L.Ed.2d 323 9

United States v. Gonzales, 697 F.2d 155 (6th Cir. 1983) 12

United States vs. Hinton, 219 F.2d 324 (7th Cir. 1955) 10,11

United States v. Voteller, 544 F.2d 1355 (6th Cir. 1976) 12,13

United States v. Whitney, 633 F.2d 902 (9th Cir. 1980), cert. denied, 450 U.S. 1004, 101 Sup. Ct. 1717, 68 L.Ed.2d 208 10

REFERENCE TO UNOFFICIAL REPORT OF OPINION BELOW

The defendant's conviction was affirmed by the United States Court of Appeals for the Sixth Circuit in Case No: 84-5204 by Opinion filed November 1, 1984, and incorporated in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

On November 1, 1984, the United States Court of Appeals for the Sixth Circuit entered an Order affirming the conviction of ROBERT H. WALLACE in the District Court for the Middle District of Tennessee.

ROBERT H. WALLACE was charged and convicted in Counts One and Two with possessing a revolver and ten firearms in March, 1983, in violation of 18 U.S.C., Section 1202(a)(1) and with being a convicted felon in possession of six firearms in violation of 18 U.S.C., Section 922(h)(1). Appellant seeks by Writ of Certiorari review by the Supreme Court pursuant to 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Amendment 4

Unreasonable searches and seizures.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 18 United States Code, 922(h)(1)

(h) It shall be unlawful for any person—
(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; or ***
to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Title 18 App. United States Code, 1202(a)(1)

Section 1202. Receipt, possession, or transportation of firearms Persons liable; penalties for violations
(a) Any person who—
(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, ***
and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

ROBERT H. WALLACE was indicted on October 19, 1983, by a federal grand jury for the Middle District of Tennessee, in an eight count indictment. Count One charged him with being a convicted felon in possession of a .357 Smith and Wesson revolver in February of 1983, in violation of Title 18, App., U.S.C., Section 1202(a)(1). Count Two charged the defendant with being a convicted felon in possession of ten firearms in March of 1983, in violation of Title 18, App., U.S.C., Section 1202(a)(1). Counts Three through Eight charged the defendant with being a convicted felon who received six of the firearms listed in Count Two, in violation of Title 18, U.S.C., Section 922(h)(1).

A motion to suppress the introduction of the weapons seized by means of a search warrant on March 18, 1983, and which provided the basis for the charges in Counts Two through Eight of the Indictment was filed on November 30, 1983. A hearing on that motion was held before District Judge John T. Nixon on December 14, 1983, after which the motion was denied.

On February 24, 1984, the defendant was sentenced to two years incarceration on Count One and two years incarceration on Count Two with the sentences running consecutively. In Counts Three through Eight the defendant was sentenced to five years on each count with the sentences running concurrently with each other and imposition of the sentences in Counts Three through Eight being suspended and the defendant placed on probation. The sentences in Counts Three through Eight were ordered to run consecutively to the sentences in Counts One and Two.

On March 18, 1983, a search warrant issued by the United States Magistrate for the United States District Court for the Middle District of Tennessee was executed, and a building on Providence Boulevard in Clarksville, Tennessee was searched. Ten guns were taken out of the building pursuant to the search warrant. These ten guns, along with an eleventh gun previously confiscated from the defendant by local police officers, served as the basis for the indictment in this case. A copy of the affidavit in support of the warrant and of the search warrant is attached hereto as part of the Appendix.

The search warrant authorized search of premises known as P & W Auto Sales and the residence of ROBERT H. WALLACE, Lot 610 and 616½ Providence Boulevard, Clarksville, Tennessee.

Connie Lane Carpenter testified at the suppression hearing as a witness for the defendant that the building searched by the agents housed living quarters on the second floor where she lived with the defendant. The address

for the living quarters was 618½ Providence Boulevard.

On the ground floor of the building was the office of P & W Auto Sales, the address for which was 616, and Queen City Collection Service, the address for which was 618. There was a stairway in the interior of the building running from a bedroom in the upstairs quarters to the office of Queen City Collection Service downstairs with a door at the bottom of the steps. Seven of the guns were found in the upstairs living quarters, with the remaining three guns being found in the ground floor office of Queen City Collection Service.

At the time of the execution of the search warrant in March of 1983, ROBERT H. WALLACE owned the building and operated P & W Auto Sales. Connie Carpenter operated the Queen City Collection Service.

Agent James Cavanaugh of the Bureau of Alcohol, Tobacco & Firearms, who obtained the search warrant in 1983, testified that in order to obtain the search warrant in March of 1983, he went to the location to observe the building in order to get an accurate description and that at the time he observed the building he did not recall seeing any numbers over any of the doorways.

Agent Cavanaugh testified that he was aware of no other intersections of Oak Street and Providence Boulevard in Clarksville, Tennessee, and that there were no other buildings in the area that matched the description on the search warrant other than the building which was actually searched in March of 1983.

When the search warrant was served on the Providence Boulevard address, agents entered through the sliding glass door of the P & W Auto office, 616 Providence Boulevard, and from there through a second door into what he described as a den-like area which was the office of the Queen City Collection Service, 618 Providence Boulevard, and proceeded upstairs to the residence at 618½ Providence Boulevard. Weapons seized from the

building were seized from the upstairs residence and from the downstairs office of Queen City Collection Service.

ARGUMENT

The weapons introduced as evidence in this case were seized pursuant to a search warrant invalid because it fails to describe with sufficient particularity the premises to be searched and fails to set forth probable cause for search of the entire premises. The warrant describes the premises to be searched as 610 and 616½ Providence Boulevard, although the true addresses of the premises searched were 616, 618 and 618½ Providence Boulevard. Furthermore, the search warrant authorizes search of the entire building although the building is divided into a separate residence and two separate businesses, each with a distinct address.

The test for determining whether premises to be searched are described with sufficient particularity is whether the officer with the search warrant can with reasonable effort ascertain and identify the place intended to be searched. **Steele v. United States**, 267 U.S. 498, 69 L.Ed. 757, 45 Sup.Ct. 414 (1925). In the instant case the true addresses for the buildings that were actually searched were 616, 618 and 618½ Providence Boulevard, although the search warrant authorized search of 610 and 616½ Providence Boulevard. The warrant, therefore, fails to satisfy the requirement of the Fourth Amendment that a search warrant may issue only on affidavit, "particularly describing the place to be searched." The Opinion of the Court of Appeals for the Sixth Circuit, in upholding the search warrant in the instant case conflicts with the ruling of the Court of Appeals for the Third Circuit in **United States v. Bedford**, 519 F.2d 650, 654-655, (3rd Cir. 1975), cert. denied, 424 U.S. 917, 96 Sup. Ct. 1120, 47 L.Ed.2d 323, holding that a search warrant

directed against an apartment house would be held invalid if it failed to describe the particular apartment to be searched with sufficient definiteness to preclude a search of other units located in the building and occupied by innocent persons.

In the instant case the affidavit fails to particularly describe the premises to be searched so as to preclude a search of other units within the same building.

There was no information provided to officers executing the search warrant indicating which of the units within the structure were to be searched pursuant to the search warrant. Therefore, the officers searched the residence and both businesses, confiscating weapons from both the upstairs residence and the office of the Queen City Collection Service.

Not only is particularity required in isolating the premises to be searched where a building or structure is divided into more than one unit, but probable cause must also exist for the search of each unit. The decision of the Court of Appeals for the Sixth Circuit in upholding the search warrant in the instant case and the search of multiple units within a single building where probable cause is not stated for the search of each deviates from the established principle followed by the Courts in this country.

Clearly, where a structure is divided into more than one unit probable cause must exist for each unit and the only generally recognized exception is where a building though divided into units is actually being used as one unit. This "singular control" exception has been uniformly followed in other circuits. In **United States v. Whitney**, 633 F.2d 902 (9th Cir. 1980), cert. denied 450 U.S. 1004, 101 Sup.Ct. 1717, 68 L.Ed.2d 208 (1981), the Court of Appeals for the Ninth Circuit adopted the "singular control" rule relying on the case of **United States v. Hinton**, 219 F.2d 324 (7th Cir. 1955), requiring that, "the scope of the warrant to search is dependent upon the

extent of the showing of probable cause. The command to search can never include more than is covered by the showing or probable cause to search." **United States v. Hinton, supra.**, at 325.

The Ninth Circuit set forth the rule as follows:

> "Therefore, when the structure under suspicion is divided into more than one occupancy unit, probable cause must exist for each unit to be searched. **Hinton, supra.**, 219 F.2d at 326. The general rule in such instances is that, 'a warrant which describes an entire building when cause is shown for searching only one apartment is void'. **Id.** The rule is not without exceptions. As the court noted in **Hinton,** the general rule would not apply if, 'the entire building is acutally being used as a single unit.' **United States v. Hinton,** 633 F.2d at 907."

The Ninth Circuit in that case, in which this Court denied certiorari, **explicitly** found that the defendant had full control and use of the house.

In **United States v. Hinton, supra.**, at 325, 326, the Seventh Circuit stated:

> "For purposes of satisfying the Fourth Amendment, searching two or more apartments in the same building is no different than searching two or more completely separate houses. Probable cause must be shown for searching each house or, in this case, each apartment." If such cause is shown there is no reason for requiring a separate warrant for each residence. A single warrant may cover several places or residences in a single building. But probable cause must be shown for searching each residence unless it be shown that, although appearing to be a building of several apartments, the entire building is **actually being used** as a single unit." (emphasis added)

The Court of Appeals for the Second Circuit also

looks to the **use** of a building where a search warrant authorizes search of an entire building subdivided into separate units. **National City Trading Corp. v. U.S.**, 635 F.2d 1020 (2nd Cir. 1980).

State Courts, too, have applied the rule in determining whether a warrant satisfies the requirements of the Fourth Amendment. The Massachusetts Appeals Court in **Commonwealth v. Erickson**, 14 Ma. App. 504, 440 N.E.2d 1190 (1982) set aside a search as violative of the Fourth Amendment, holding:

> "A warrant which directs the search of an entire multiple-occupancy building, when probable cause exists to search only one or more separate dwelling units within the building, is void because of the likelihood that all units within the dwelling will be subjected to a justified and indiscriminate search. *** This rule is inapplicable to cases where probable cause exists to search the whole building,*** or, in certain situations, where it is shown that general access to, and control over, all the building's subunits are available to building occupants..." (Citations omitted)

Indeed, the Court of Appeals for the Sixth Circuit adopted this rule in **United States v. Voteller**, 544 F.2d 1355 (6th Cir. 1976).

In every case upholding a search warrant there has been an explicit determination that the separate units were used as one. In **United States v. Gonzales**, 697 F.2d 155 (6th Cir. 1983), the affidavit in support of the search warrant specifically described the property as, "a two-story brick and while aluminum siding building, with an apartment on the second floor and a former business place on the first floor," and the Court of Appeals for the Sixth Circuit upheld the warrant, finding at page 156:

> "The supporting affidavit explicitly stated that the defendant who had been observed delivering chemicals to the building, were seen 'going back and forth between

the second floor apartment***and the vacant room on the first floor.' This evidence can be seen as establishing probable cause to search in each, clearly described unit where the contraband known to have been brought into the building, **United States v. Voteller, supra.**, or as establishing probable cause to believe that, notwithstanding the division of the structure, the defendants' 'going back and forth' **put them in control of the whole building as if it were a single unit.**" (emphasis added)

In the instant case the warrant directs search of an entire building containing a residence and two separate businesses but describes only a residence and one business as places to be searched. There being no probable cause alleged to search the entire building, especially the Queen City Collection Service, the search warrant is invalid and the evidence obtained pursuant thereto must be suppressed.

The Opinion of the Sixth Circuit upholding the search in the instant case deviates from the established law in federal and state courts, and, therefore, the Court should grant the Writ of Certiorari to consider this question of constitutional law.

CERTIFICATE OF SERVICE

I certify that I have forwarded a copy of the foregoing Petition for Writ of Certiorari to Mr. Joe B. Brown, U.S. Attorney, 879 U.S. Courthouse, 800 Broadway, Nashville, Tennessee, 37203, and the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 28th day of December, 1984.

Dale Quillen

Dale Quillen

APPENDIX

No. 84-5204

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Robert H. Wallace, Defendant-Appellant.	On Appeal from the United States District Court for the Middle District of Tennessee.

Decided and Filed November 1, 1984

Before: EDWARDS and CONTIE, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

PER CURIAM. This is an appeal from the conviction of appellant Robert H. Wallace, who had been indicted by a federal grand jury in the Middle District of Tennessee. Counts 1 and 2 charged Wallace with possessing a revolver and 10 firearms in March, 1983, in violation of 18 U.S.C. §1202(a)(1). Wallace was charged also with being a convicted felon who received six of the firearms referred to above, in violation of 18 U.S.C. §922(h)(1). A motion to suppress the evidence (the weapons) was made and heard before District Judge John T. Nixon who denied the motion.

At trial, the defendant, having waived a jury trial at

the conclusion of the government's proofs, was found guilty by the court. The defendant was sentenced to two years incarceration on count 1 and two years incarceration on count 2 with the sentences to run consecutively. As to counts 3 to 8, the defendant was sentenced to five years on each count with the sentences to run concurrently with each other, and with imposition of the sentences on counts 3 to 8 suspended and the defendant placed on probation. The sentences in counts 3 to 8 were ordered to run consecutively to the sentences in counts 1 and 2.

The record is replete with evidence which would support the convictions. The sole issue in this appeal is whether the search warrant issued for these weapons was fatally flawed so that the District Court should have and this court now must suppress said evidence.

Basically, two claims are made in this appeal pertaining to the defectiveness of the search warrant. Appellant contends that the affidavit recited that Wallace had firearms in his possession on February 23, 1983, but that this did not set forth probable cause to believe the firearms would be located on the premises searched 26 days later. Secondly, appellant contends that the search warrant was invalid because the property to be searched was not "particularly described."

Our review of the record indicates that the affidavit containing Agent Cavanaugh's summary of the testimony of the defendant on March 10, 1983, is to the effect that defendant had numerous weapons in his house on that date. As to the lack of particularity of the description of the premises to be searched, we find no fatal errors. The affidavit for the search warrant in this case is entitled "The premises known as P & W Auto Sales, and the residence of Robert H. Wallace, Lots 610 and 616½ Providence Boulevard, Clarksville, Tennessee." The premises are further described in some detail as located "at the corner of Providence Boulevard and Oak Street...

on a hill with three levels at the rear and two levels at the Providence Boulevard side. An outside stairway leads up to the Wallace apartment from the rear. The premises has a brick front facing Providence Boulevard, and the Oak Street side is painted white...adjacent to a large building with a sign painted on the side in large letters *Rug Room.*"

Our acquaintance with this record and the oral arguments of the parties convinces us that the search warrant was issued on sworn evidence which properly supported it and that the search was within the premises described in the warrant.

Finding no merit to any other issues advanced by appellant, the judgments of conviction are hereby affirmed.

SEARCH WARRANT ON WRITTEN AFFIDAVIT

United States District Court

United States of America

v.

The premises known as P & W Auto Sales, and the residence of Robert H. Wallace, Lots 610 and 616½ Providence Boulevard, Clarksville, Tennessee.

District: Middle Judicial District of Tennessee

To:
Any Special Agent of the Bureau of Alcohol, Tobacco and Firearms

Affidavit(s) having been made before me by the below-named affiant that he/she has reason to believe that (on the premises known as) P & W Auto Sales and the

residence of Robert H. Wallace, Lots 610 and 616½ Providence Boulevard, Clarksville, Tennessee: more particularly described as a car lot at the corner of Providence Boulevard and Oak Street, a large sign at the premises reading P & W Auto Sales; P & W Auto Sales painted on wall of the structure in the Middle District of Tennessee there is now being concealed certain property, namely Firearms, more particularly described as a nickel plated, .38 caliber Smith and Wesson, and seven or eight other pistols and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above-described and the grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s),

YOU ARE HEREBY COMMANDED to search on or before _____ (not to exceed 10 days) the person or place named above for the property specified, serving this warrant and making the search (in the daytime—6:00 A.M. to 10:00 P.M.) (at any time in the day or night)* and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant to Honorable Kent Sandidge, III as required by law.

Name of Affiant: James M. Cavanaugh

Signature of Judge** or U.S. Magistrate:
Honorable Kent Sandidge, III

*If a search is to be authorized "at any time in the day or night" pursuant to Federal Rules of Criminal Procedure Rule 41(c), show reasonable cause therefor.

**United States Judge or Judge of a State Court of Record

The premises has an office for the car lot on the first level facing Providence Boulevard, clearly marked with a third sign, and the words "Notary Public" on the door. The premises structure is built on a hill with three levels at the rear and two levels at the Providence Boulevard side. An outside stairway leads up to the Wallace apartment from the rear. The premises has a brick front facing Providence Boulevard, and the Oak Street side is painted white. The structure is adjacent to a large building with a sign painted on the side in large letters *Rug Room.*